

No. 16,442

United States Court of Appeals
For the Ninth Circuit

O. W. IRWIN, Trustee of the Estate of
GENERAL EQUIPMENT Co., a copart-
nership composed of Wallace D. Loe
and John O. Currence, Bankrupt,

Appellant,

VS.

B. H. TANNER,

Appellee.

BRIEF FOR APPELLEE.

TWOHIG, WEINGARTEN & HAAS,

MYRON B. HAAS,

Seaside Professional Building, Seaside, California,

Attorneys for Appellee.

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ARGUMENT.

Taking Appellant's contentions in reverse order, Appellee submits that the testimony of the Notary Public was properly admitted and that his testimony shows the chattel mortgage was properly acknowledged.

The statement in Appellant's Opening Brief (p. 12) that:

“The testimony of Appellee Tanner and his witnesses, Montgomery and Hutchison, *supra*, clearly shows that the chattel mortgage was signed at the place of business and was thereafter taken by Tanner to the office of the notary, and that the

mortgagors were not present at the time that the notary signed the chattel mortgage and affixed his seal”

is in part misleading.

These witnesses testified only to the signing of the chattel mortgage. They gave no testimony concerning acknowledgment, signature by the Notary Public or sealing of the document by the Notary.

Parenthetically, it may be noted that the certificate of acknowledgment need not immediately follow the acknowledgment.

1 *Cal. Jur.* 2d Acknowledgments, Section 29, p. 503, Paragraph 2.

The testimony of the Notary Public did not impeach, but did, in fact, corroborate and supplement the testimony of Appellee's previous witnesses.

The Notary Public testified that the chattel mortgage in question was not executed on August 31, 1957, the date it bears, but was to the best of his knowledge executed on September 13, 1957, and was, in fact, acknowledged before him on that date in his office. He explained why the chattel mortgage was not signed on August 31, 1957. (T.R., pp. 37-39.)

A comparison of the testimony of the Notary Public with that of Appellee's witnesses fails to show any impeachment.

The witnesses testifying for Appellee, in the order of their testimony, were Jack Montgomery, W. D. Hutchison and the Appellee, B. H. Tanner.

Jack Montgomery testified that the chattel mortgage was signed ten or twelve days after September 1, 1957, in the place of business and explained the reasons for the delay in signing the chattel mortgage after he and his partners had taken possession of the business. (T.R., p. 26.)

W. D. Hutchison testified that the chattel mortgage was not signed until approximately 12 to 14 days after September 1, 1957. (T.R., pp. 27-28.)

B. H. Tanner testified that the chattel mortgage was not signed until the 12th or 13th of September, 1957, and explained why it was not signed until that time. (T.R., p. 29.)

None of these three witnesses gave any testimony concerning acknowledgment of the chattel mortgage.

A review of the transcript makes it clear that the testimony of the Notary Public corroborated the testimony of the previous three witnesses for Appellee as to the date of the execution of the chattel mortgage and the reason it was not executed until September 13, 1957.

The testimony of the Notary Public as to acknowledgment was not contrary to any testimony of the previous three witnesses as none of them gave any testimony concerning the acknowledgment.

The Notary Public was a competent witness to so testify.

1 *Cal. Jur.* 2d, Acknowledgments, Section 16, p. 488; Section 47, pp. 530-531;

Within, "California Evidence," p. 436, Section 388 (a).

The fact that the chattel mortgage was a purchase price chattel mortgage should not be forgotten. It is submitted that the guide to the proper ruling herein was expressed by Judge Yankwich to the effect that California law favors the vendor by recognizing a lien for his unpaid purchase price,

“So a ruling which protects against creditors a chattel mortgage given to secure the purchase price of the personal property is in harmony with this generous attitude of the law.”

In re Mercury Engineering, 68 Fed. Supp. 376, 379.

CONCLUSION.

Appellee contends the testimony of the Notary Public was proper and accordingly shows the chattel mortgage was properly acknowledged. The order of the District Judge should be affirmed.

Dated, Seaside, California,
August 24, 1959.

Respectfully submitted,

TWOHIG, WEINGARTEN & HAAS,
By MYRON B. HAAS,
Attorneys for Appellee.